

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURTIS LEE DEAN,

Defendant-Appellant.

UNPUBLISHED

December 20, 2005

No. 255872

Jackson Circuit Court

LC No. 03-004019-FH

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of OUIL, third offense, MCL 257.625(1), and was sentenced to forty-eight months' probation, with the first 180 days to be served on a tether. Defendant appeals as of right. We affirm, but remand for proceedings consistent with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.215(E).

Defendant collaterally challenges a 1998 juvenile conviction for minor operating a motor vehicle while having a bodily alcohol content. He asserts that the conviction could not be used as a predicate offense for OUIL, third offense, because the recording of the juvenile proceeding indicated that he was not represented by counsel, and was not advised of a right to appointed counsel. Since defendant received a sentence of sixty days in the Youth Hall, suspended, the trial court held that he could not collaterally attack this conviction based on *People v Reichenbach*, 459 Mich 109; 587 NNW2d 1 (1998). In that case, the Supreme Court held that an uncounseled prior conviction that did not result in actual incarceration could be used as a predicate offense for OUIL, third offense. The Court relied on *Argersinger v Hamlin*, 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972), in which the Supreme Court held that a defendant could not be incarcerated for a misdemeanor unless represented by counsel, and *Scott v Illinois*, 440 US 367; 99 S Ct 1158; 59 L Ed 2d 383 (1979), in which the Court clarified this rule, distinguishing fines from "actual imprisonment," and holding "that no indigent criminal defendant [could] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 US at 373-374. The *Reichenbach* Court concluded that a defendant accused of a misdemeanor is not entitled to appointed trial counsel if he receives a conditional sentence under which he might be imprisoned, and that there was no bar to using an uncounseled conviction for enhancement where a conditional or suspended sentence did not actually result in imprisonment.

Defendant challenges this holding based on *Alabama v Shelton*, 535 US 654; 152 S Ct 1764; 152 L Ed 2d 888 (2002). In that case, the Supreme Court was dealing with the direct appeal of a conviction, and held that the defendant's Sixth and Fourteenth Amendment rights were violated when he was not represented by counsel for a misdemeanor for which he was sentenced to thirty days in jail, even though the sentence was suspended. Here, defendant argues that *Shelton, supra*, compels a holding that his 1998 uncounseled conviction is constitutionally infirm and therefore cannot be used as a predicate offense to enhance his OUIL conviction.

We note that defendant's position is supported by *State of Utah v Ferguson*, 2005 UT App 144; 111 P 3d 820 (2005), and *State of Ohio v Williams*, 2002 Ohio 4244 (Ohio App, 2002). However, we are also cognizant that *Shelton, supra*, addressed the constitutionality of an uncounseled conviction, and not the subsequent use of that conviction as a predicate for another offense. In this state, the propriety of using an uncounseled prior conviction resulting in a conditional sentence for enhancement has been addressed by *Reichenbach, supra*. As the Supreme Court stated in *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993):

While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it.

We further note that the prosecutor has attached documents to its appellate brief purporting to establish that defendant waived his right to counsel in the 1998 juvenile court proceeding. This predicate offense was not an element of the crime of OUIL, third offense, but rather was part of a sentence enhancement scheme. *People v Weatherholt*, 214 Mich App 507; 543 NW2d 35 (1995). Consistent with MCL 257.625(12), it only had to be established at sentencing. This is not a question of whether there was sufficient evidence to convict the defendant of the crime such that a dearth of evidence would preclude retrial of the charge. See *People v Watson*, 245 Mich App 572, 596; 629 NW2d 411 (2001). Thus, pursuant to MCR 7.216(A)(5) and (7), we remand for a hearing to allow the prosecutor to establish the waiver of counsel.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood